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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1296.

BEN F. HOPKINS,
Petitioner,

vs.

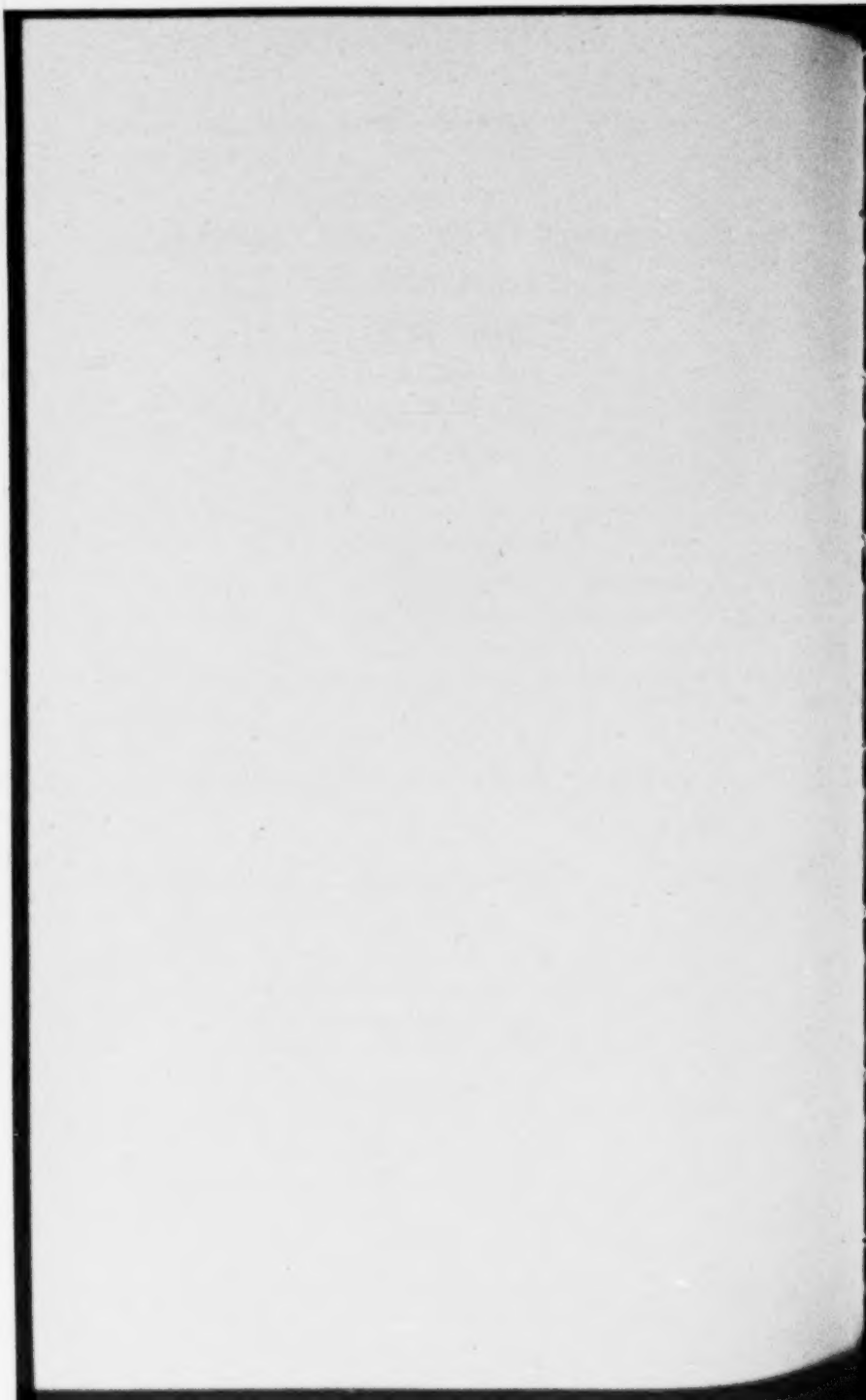
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER.

DAVID A. GASKILL,
1122 Guardian Building,
Cleveland, Ohio,

GLEN O. SMITH,
Union Commerce Building,
Cleveland, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 3647



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The respondent has filed a brief in opposition to the petition for certiorari, and this brief is submitted as a reply to the respondent's brief.

ARGUMENT.

In an effort to treat with severe brevity the questions presented in this proceeding, the respondent has, doubtless unwittingly, distorted the questions that are presented to this Court for consideration.

One of the principal questions presented for the consideration of this Court is whether the Circuit Court of Appeals has decided an important question of federal law which has not, but which should be, settled by this Court. This question appears to be ignored by the respondent. Instead his brief is primarily an extremely abbreviated discussion of the merits of the case, resting upon assertions as to the controlling effect of certain Circuit Court of Appeals decisions. If the Circuit Court cases do go as far as the respondent asserts, then they have gone so far beyond the wholesome concept of the doctrine of *Helvering vs. Clifford,* 309 U. S. 331 (1940), as to require examination of the extensions of that doctrine by this Court.

An extended explanation of the inapplicability of these cases would be out of place at this time. Indeed the respondent's argument of the merits of the case, however much condensed, is out of harmony with the rules of this Court as we understand them. It is appropriate to point out, however, if the desirability of granting certiorari is to depend upon whether *other* Circuit Court of Appeals decisions controlled the decision below, that the respondent has, nevertheless, misapplied the principles of such other decisions.

In the respondent's brief it is admitted (footnote No. 3, page 8) that the right of the petitioner's sons to receive the income under the trusts became fixed after the sons reached their majority; and that they were approaching their majorities when the trusts were created. There has never been a case in which the right to withhold income during the minority of a son has been taken into account in determining whether the income of a trust is taxable to the grantor. It is true that in *Stockstrom v. Commissioner*, 148 F. (2d) 491 (C. C. A. 8, 1945), and other cases cited by the respondent, a power to withhold income from distribution during the entire lifetime of the beneficiary (income which, when withheld, would pass to the remainderman chosen by the grantor) has been taken into account along with other broad powers of the grantor in determining taxability. The respondent asserts the applicability of such decisions under the claim that the grantor had such a power to divert the income to a remainderman "during the taxable years." Technical tax phraseology does not disguise the fact that this is merely a power to withhold during minority, a wise and proper provision which has never been taken into account in the cases in determining taxability. Indeed the respondent has proposed new regulations which specifically exclude such a power during minority as a test of taxability.

On pages 10 and 11 of his brief, the respondent, referring to the petitioner's powers as co-trustee, asserts that

"These broad management powers, especially when viewed in conjunction with taxpayer's absolute right to change the co-trustee and the provision exonerating either trustee of liability for any action it disapproved, constitute in the aggregate a bundle of rights sufficient to justify the Tax Court's treatment of taxpayer as the substantial owner of the trust property."

The following observations with respect to this statement are in order:

(a) In all reported cases the "broad management powers" taken into account in determining taxability have been powers reserved only to the grantor as trustee or otherwise. Here the grantor was trustee along with a large bank and nothing could be done by the petitioner without joint action by the bank. Common sense would indicate that for purposes of the application of the *Clifford* rule, the situation is practically the same as if the bank had been sole trustee, and no case has been found which places any emphasis whatsoever upon power held jointly with a bank trustee.

(b) While the petitioner could change the co-trustee, he was required to appoint another large bank or trust company and there is no basis for assuming that a newly appointed banking institution would be wholly subservient to the will of the grantor.

(c) The respondent failed to point out that the record shows that the trustee powers in the trust were usual and customary in this community.

(d) The cases cited do not sustain the above quoted proposition asserted by the respondent.

Aside from the reference to broad management powers which do not in fact exist, it may be noted that the respondent's brief, on the whole, emphasizes such powers and collateral circumstances of the trust as justification

for affirmance on the merits. In fact, many of the circumstances stressed by the respondent in his statement of the case were specifically excluded below as bearing upon the taxability of the income of the trust. It is to be noted, however, that the primary basis of the decision below was the alleged power of the grantor over income. We are concerned with the importance of the decision below as a precedent, and any effort to obscure the central issue of the case should be disregarded.

The respondent next asserts, on page 11, that affirmance was proper under the *Dobson* rule (*Dobson v. Commissioner*, 320 U. S. 489 (1943)), and it is claimed that "the judicial function is exhausted when there is found to be a rational basis" for the Tax Court's decision. This question is briefly discussed in the petitioner's main brief and its materiality at the present state of the proceeding is subject to question. We are concerned with the application of the principles of law set forth in the decisions of this Court in the *Clifford* and *Stuart* (*Helvering v. Stuart*, 317 U. S. 154 (1942)) cases. Indeed, the court below affirmed *not* under the *Dobson* rule but on the merits. It is also appropriate to mention that the case involves and in fact turned on the interpretation of a trust agreement. The Tax Court grounded its decision upon an erroneous interpretation that alleged powers over income continued during the lifetime of the petitioner. The respondent apparently admits that this construction is erroneous since in footnote No. 3 of his brief, page 8, it is stated that the sons' right to receive income became fixed after they reached their majority.

On pages 10, *et seq.* the respondent undertakes to refute the petitioner's contention that the decision below conflicted with *Hawkins v. Commissioner*, 152 F. (2d) 221 (C. C. A. 5, 1945), and *Hall v. Commissioner*, 150 F. (2d) 304 (C. C. A. 10, 1945).

There will probably never be any two cases involving the application of the *Clifford* rule where the facts are

exactly the same. This Court is concerned with the question whether the *basis* of the courts' decisions in the *Hawkins* and *Hall* cases is contrary to the legal principles applied in the court below. It was shown in the petitioner's main brief that such a conflict existed. The respondent's brief does not rebut this conclusion, but merely points out factual differences which are not pertinent here. For example, respondent directs attention to the fact that in the *Hawkins* case, a bank was the sole trustee, while in the present proceeding the petitioner and the bank were co-trustees. This is a difference which is not a distinction and which has nothing to do with the issue of whether a power with respect to income of the type here involved amounts to substantial ownership. The same is essentially true in the respondent's treatment of the *Hall* case. As was pointed out in the petitioner's brief, the *Hall* decision is authority for the proposition that a right to withhold income from one beneficiary which, upon the death of that beneficiary prior to distribution, would necessarily go to another person is not a "spray" or "sprinkle" provision within the meaning of the *Buck* rule. The respondent overlooks this basic principle of the *Hall* decision, and attempts to distinguish it on its facts by directing attention to the fact that the trust there was distributable after a period of years to the current beneficiary if he was then living, while the trusts here involved lasted for the lifetime of the beneficiary. The withheld income in both situations might go to other beneficiaries. The difference between the two situations is not significant, particularly when it is considered that the beneficiaries in the case at bar had a power of appointment to direct the distribution of the principal upon their death, and the power to withhold income from distribution continued only for a short time during the minority of the beneficiary. As stated, the principle of the *Hall* case is that such a power is not a "spray" or "sprinkle" provision within the meaning of the *Buck* rule. The approach in the *Hall* case to the problem thus presented ap-

pears to be more logical than the contrary approach of the court below. It is now in order for this Court to decide which of the two principles is to be adopted.

The respondent apparently makes no attempt to answer the following reasons given by the petitioner for the allowance of the writ:

(a) That the decision below was contrary to *Helvering v. Clifford, supra,* and *Helvering v. Stuart, supra.*

(b) That an important question of federal law was decided by the court below which has not but should be settled by this Court.

(c) That the decision below, by affirming without opinion the Tax Court's interpretation of the trust instrument which was the basis of the Tax Court's decision and which was squarely in conflict with a prior decision of the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

DAVID A. GASKILL,
1122 Guardian Building,
Cleveland, Ohio,

GLEN O. SMITH,
Union Commerce Building,
Cleveland, Ohio,
Counsel for Petitioner.